85-1530

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pending a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court (App., *infra*, 1a-10a) is reported at 624 F. Supp. 197. The prior order of the district court granting appellee's motion for a preliminary injunction (App., *infra*, 11a-19a) is reported at 603 F. Supp. 249. The Secretary's findings and preliminary order (App., *infra*, 20a-23a) are unreported. The recommended decision and order of the administrative law judge (App., *infra*, 29a-43a) are unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 24a) was entered on November 18, 1985. The notice of appeal to this Court was filed on December 17, 1985 (App., *infra*, 25a-26a, 27a-28a). On February 6, 1986, Justice Powell issued an order extending the time within which to docket this appeal to and including March 17, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 405(a) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(a), provides:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

3. Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), provides:

> (1) Any employee who believes he has been discharged, disciplined, or otherwise discriminated against by any person in violation of subsection (a) or (b) of this section may, within one hundred and eighty days after such alleged violation occurs, file (or have filed by any person on the employee's behalf) a complaint with the Secretary of Labor alleging such discharge, discipline, or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify the person named in the complaint of the filing of the complaint.
>
> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed by subparagraph (B) of this paragraph. Thereafter, either the person alleged to have committed the violation or the complainant may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days. In the interim, such proceedings may be terminated at any time on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.
>
> (B) If, in response to a complaint filed under paragraph (1) of this subsection, the Secretary of Labor determines that a violation of subsection (a) or (b) of this section has occurred, the Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages. If such an

order is issued, the Secretary of Labor, at the request of the complainant may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

STATEMENT

1. Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305, prohibits employers in the motor transportation industry from taking retaliatory measures against employees who assert their rights to safe working conditions. The statute provides that "[n]o person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" on the ground that the employee filed a complaint or otherwise instituted a proceeding "relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order" or on the ground that the employee objected for safety reasons to operating a commercial motor vehicle. 49 U.S.C App. 2305(a) and (b).[1]

An employee who "believes he has been discharged, disciplined, or otherwise discriminated against by any person" in violation of these statutory protections may file a

[1] The statute defines a "commercial motor vehicle" as a vehicle used "principally to transport passengers or cargo" that has a weight rating of ten thousand or more pounds, is designed to transport more than ten persons, or is used to transport hazardous materials. 49 U.S.C. App. 2301(1).

complaint with the Secretary of Labor (49 U.S.C. App. 2305(c)(1)).[2] Upon receipt of a complaint, the Secretary is required to "notify the person named in the complaint of the filing of the complaint" (*ibid.*). The Secretary must then investigate the complaint in order to "determine whether there is reasonable cause to believe that the complaint has merit" (49 U.S.C. App. 2305(c)(2)(A)).[3] If, as a result of the investigation, the Secretary "conclude[s] that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order" providing for (1) abatement of the retaliatory conduct, (2) reinstatement of the employee to his former position, and (3) back pay and any other compensatory damages (*ibid.*).

[2] The Secretary has delegated his authority under Section 405 to the Assistant Secretary for Occupational Safety and Health, who, in turn, has delegated this authority to the Regional Administrators of the Occupational Safety and Health Administration.

[3] The Secretary has adopted detailed written procedures governing the investigation of complaints filed by employees under Section 405. The current version of these procedures requires the Labor Department investigator to interview the complainant and encourage the complainant to identify witnesses who can support his allegations. The investigator must also "contact the [employer], notify the [employer] of the substance of the complaint and arrange to meet with the [employer] or its counsel to interview the appropriate witnesses." OSHA Instruction DIS.4A at V5 (Aug. 26, 1985). The written procedures emphasize that the investigator should obtain evidence corroborating the complainant's allegations, secure the employer's response to the allegations, and attempt to corroborate the employer's response (*id.* at V5-V7). The procedures in effect at the time of the events in this case similarly required the investigator to consult with the employer. OSHA Instruction CPL 2.45A CH-4 at X5 (Mar. 8, 1984); OSHA Instruction DIS.6 at 4, 8-9 (Dec. 12, 1983); OSHA Investigation Manual § 11(c) at V1, V13-V14 (1979).

The employee or the employer may file objections to the Secretary's findings and request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)). The statute specifically provides that the filing by the employer of objections to the Secretary's findings and a request for a hearing "shall not operate to stay any reinstatement remedy contained in the preliminary order" (*ibid.*). The hearing is held before an administrative law judge (ALJ), who issues a recommended decision that is reviewed by the Secretary. The Secretary must issue a final order within 120 days of the conclusion of the hearing; that order is subject to judicial review in the appropriate court of appeals. 49 U.S.C. App. 2305(c)(2)(A) and (d)(1).[4]

2. Appellee is a motor common carrier engaged in the interstate trucking business, and therefore is subject to the requirements of Section 405 of the Surface Transportation Assistance Act. 49 U.S.C. App. 2301(3); App., *infra*, 1a, 20a, 46a. On November 22, 1983, appellee discharged Jerry Hufstetler, one of its truck drivers, allegedly because Hufstetler had committed an act of dishonesty; appellee asserted that Hufstetler intentionally disabled several of the lights on his truck, thereby creating a false breakdown. Hufstetler filed a grievance under his union contract claiming that he had been fired in retaliation for his repeated safety-related requests for repairs to his truck. The first arbitration panel could not reach a decision regarding the grievance; the second panel rejected Hufstetler's claim. App., *infra,* 1a-2a, 21a, 47a-48a.

Hufstetler next filed a complaint with the Secretary alleging that he had been discharged in violation of Section 405 of the Surface Transportation Assistance Act because his discharge was in retaliation for his requests for

[4] If neither the employer nor the employee requests a hearing, "the preliminary order [is] deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)).

safety repairs. The Secretary conducted an investigation of Hufstetler's allegations, and verified the allegations "through credible, independent evidence." App., *infra,* 44a-45a. In the course of the investigation, appellee was afforded "the opportunity to fully state and support [its] positions" (*id.* at 45a). Appellee submitted a "written position statement with supporting affidavits explaining the circumstances of the discharge," and appellee's attorneys orally presented its views at a meeting with Labor Department officials. *Id.* at 49a; Complaint ¶¶ 11, 13.

After an 11-month investigation, the Secretary concluded that there was reasonable cause to believe that appellee had discharged Hufstetler in violation of Section 405, and issued a preliminary order directing appellee to reinstate Hufstetler (App., *infra*, 3a, 20a-23a). The Secretary found that "[Hufstetler] had a two year history of bringing vehicle safety problems to the attention of [appellee] and had complained to [the Department of Transportation] and to elected public officials. These complaints constitute protected activity under the [Surface Transportation Assistance] Act" (*id.* at 22a). The Secretary further found that "[appellee] had warned [Hufstetler] and threatened to get him due to his excessive breakdowns due to [Hufstetler's] recognition of safety violations" and that "[appellee] had threatened to do anything [it] could to catch [Hufstetler] doing something wrong, to get rid of him" (*id.* at 21a, 22a).

With respect to appellee's allegation that Hufstetler had been dishonest, the Secretary determined that "[appellee's] evidence to support the discharge is conjecture. [Hufstetler] has presented evidence to support his innocence" (App., *infra*, 21a). Based on these facts, the Secretary concluded that "[appellee's] termination of [Hufstetler's] employment was discriminatorily motivated by [Hufstetler's] protected activity" (*id.* at 22a), and

ordered appellee "to immediately offer reinstatement to [Hufstetler]," to compensate Hufstetler with back pay, and "to expunge from [Hufstetler's] personnel records any adverse references to his discharge or any protected activity" (*id.* at 23a).

3. On February 1, 1985—11 days after the Secretary's issuance of the preliminary order—appellee commenced this action in the United States District Court for the Northern District of Georgia seeking an injunction against the enforcement of the Secretary's order and a declaratory judgment that the Secretary's order was unconstitutional. Appellee claimed that the issuance of the reinstatement order without a prior "evidentiary hearing" violated its due process rights. Complaint ¶¶ 19, 22. The district court issued a preliminary injunction barring enforcement of the Secretary's reinstatement order. App., *infra*, 11a-19a.[5]

On November 18, 1985, the district court issued an order granting appellee's motion for summary judgment (App., *infra*, 1a-10a). The court declared Section 405(c)(2)(A) "unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing" and entered a permanent injunction "restrain[ing] and enjoin[ing] [appellants] from further

[5] Appellee also filed objections to the Secretary's findings and a request for an on-the-record hearing pursuant to 49 U.S.C. App. 2305(c)(2)(A). The hearing was held before an administrative law judge on March 26-29, 1985, and the ALJ issued his recommended decision and order on October 30, 1985 (App., *infra*, 29a-43a). The ALJ observed that Hufstetler had filed numerous safety-related complaints (*id.* at 32a-35a, 39a-41a), and found that "[t]he record is replete with many statements by [appellee's] supervisors demonstrating their animus toward [Hufstetler] as a result of his engaging in protected activities. The issuance of warning letters to [Hufstetler], while other employees were not reprimanded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive" (*id.* at 41a). The ALJ further found that the evidence did not indicate that Hufstetler was discharged for a reason other than his safety-related activities (*id.* at 41a-42a).

issuance of preliminary orders of reinstatement * * * without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process" (*id.* at 9a).[6]

The district court observed that in order to ascertain the requirements of due process it is necessary to consider "the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail" (App., *infra*, 6a). The court found that appellee had "important interests in not being compelled to reinstate an employee discharged for wrongful conduct" (*ibid.*), noting that reinstatement of an unsatisfactory employee could undermine discipline and morale and " 'ultimately impair the efficiency of an office or agency.' " *Id.* at 7a, quoting *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693, 703 (6th Cir. 1985).

The court further found that "the procedures used by [the Department of Labor] were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation" (App., *infra*, 8a (citation omitted)).[7] With respect to the government interest, the court concluded that "[a]lthough the governmental interests in promoting

[6] The district court also held that appellee was not required to exhaust its administrative remedies (App., *infra*, 4a-5a), that the controversy between the parties was not moot (*id.* at 5a), and that the district court did not lack jurisdiction over appellee's claim (*ibid.*). We do not seek review of these determinations.

[7] The court noted (App., *infra*, 7a) that the Secretary "failed to make available the names and statements of witnesses upon which [the] decision was based."

safety on the highways and prohibiting retaliatory discharge are indeed valid, [the Department of Labor] has failed to show any compelling considerations which necessitate postponing the hearing" (*ibid.*). It found that "the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible" because the statute provides for a postreinstatement hearing (*ibid.*).

Weighing these considerations, the court found that "[t]o the extent that the statute fails to provide employers with a meaningful opportunity to be heard, it fails to meet the requirements of due process. Such deficiency may only be remedied by conducting a hearing, prior to an order of reinstatement, whereby the parties are given a meaningful opportunity to be heard prior to the Secretary's decision" (App., *infra*, 9a). The court concluded that the requirements of due process could be satisfied only through a prereinstatement "evidentiary hearing" at which the employer is afforded "at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" (*ibid.*).

THE QUESTION IS SUBSTANTIAL

In a sweeping injunctive order, the district court has invalidated a clearly articulated element of Congress's plan to enforce compliance with safety standards in the motor transportation industry. Congress concluded that safety complaints by motor carrier employees would be a significant source of information about motor carriers' compliance with safety standards. It therefore expressly protected such employees against reprisals for safety-related activity, and specifically provided that an employee discharged in violation of this statutory protection would be reinstated on a temporary basis as soon as the Secretary found reasonable cause to support his claim of retaliatory discharge. The district court's requirement of an "evidentiary hearing" prior to the temporary reinstatement of an

unlawfully discharged employee plainly interferes with the protection Congress has accorded employees who report safety violations.

Moreover, the district court's decision rests upon an erroneous view of both the requirements of due process and the regulatory scheme at issue here. This Court repeatedly has held that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action," and that "notice and an opportunity to respond" are all that is required in such circumstances. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12 (citation omitted). The district court ignored this settled rule in holding that the Secretary must conduct an "evidentiary hearing" before issuing a preliminary reinstatement order, even though the statute expressly requires a prompt postreinstatement hearing. The district court also ignored the fact that the procedures followed by the Secretary in this case—which reflect the Secretary's written policy regarding the enforcement of Section 405—afforded appellee notice and an opportunity to respond prior to the issuance of the preliminary reinstatement order. Congress's scheme thus plainly comports with the requirements of due process; review by this Court therefore is clearly warranted.

1. The threshold question in assessing a procedural due process claim such as appellee's claim here is whether the challenged government action resulted in the deprivation of a liberty or property interest protected by the Due Process Clause. *Loudermill*, slip op. 4-5; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972). We do not dispute that the Secretary's order would have deprived appellee of such a property interest. The order required appellee to rehire its former employee; it therefore would have resulted in a deprivation of property because appellee would have been required to pay the salary of the rehired employee during the term of his reinstatement.

The issue here, therefore, is to ascertain the procedures that the Due Process Clause requires before the Secretary may order the temporary reinstatement of an employee pending further review: "Once it is determined that due process applies, the question remains what process is due" (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). Under this Court's decisions, "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see also *Loudermill*, slip op. 9; *Goss* v. *Lopez*, 419 U.S. 565, 578-580 (1975).

We certainly do not dispute that an employer should be afforded an opportunity to be heard before the employer may be required to reinstate an employee on a temporary basis pending further review of the matter. In our view, however, the district court erred in concluding that an evidentiary hearing—complete with an opportunity to confront and cross-examine witnessess—must be held before the issuance of such a temporary reinstatement order. This Court's decisions make clear that it is sufficient for the Secretary to afford an employer notice and an opportunity to respond to the allegation of an unlawful discharge before issuing a temporary reinstatement order, so long as a prompt postdeprivation hearing also is available.

a. This Court has considered in a variety of other contexts the question presented here—whether the Due Process Clause requires a predeprivation evidentiary hearing

when a postdeprivation hearing is provided to the person deprived of the property interest. The " 'ordinary principle' " established by the Court's decisions is that " 'something less than an evidentiary hearing is sufficient prior to adverse administrative action.' " *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979) (citation omitted); see also *Loudermill*, slip op. 8-9, 12; *Mathews*, 424 U.S. at 343. Thus, "[i]n only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse government action" (*Loudermill*, slip op. 12). The Court otherwise has concluded that due process is satisfied so long as the party to be deprived of the property interest is provided with notice of the case against him and an opportunity to present his side of the story. *Ibid.*; *Barry* v. *Barchi*, 443 U.S. 55, 63-64 (1979); *Mackey* v. *Montrym*, 443 U.S. at 13-15; *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977); *Mathews*, 424 U.S. at 332-349; see also *Signet Construction Corp.* v. *Borg*, 775 F.2d 486, 491-492 (2d Cir. 1985).

For example, in *Barry* v. *Barchi*, *supra*, the Court held that an evidentiary hearing was not required prior to the temporary suspension of a horse trainer suspected of complicity in the drugging of a race horse. The Court stated that "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging" (443 U.S. at 64). The Court held that the finding of the testing official that the horse was drugged, combined with a state evidentiary presumption, was sufficient to establish probable cause. It noted that the trainer "was given more than one opportunity to present his side of the story to the State's investigators" (*id.* at 65), and concluded that these procedures "sufficed for the purposes of probable cause and interim suspension" (*id.* at 66). Thus, so long as a prompt postdeprivation hearing is available under the relevant

statutory scheme, the Court "generally [has] required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be" (*Mackey* v. *Montrym,* 443 U.S. at 13).

An assessment of the factors identified by the Court in *Mathews* makes clear that this general rule regarding predeprivation process applies in the present context. First, the employer's interest, although significant, is not more substantial than the interests at issue in the Court's previous cases concerning predeprivation process. Thus, despite "the severity of depriving a person of the means of livelihood," the Court has held that the termination of a government employee need only be preceded by notice and an opportunity to respond (*Loudermill,* slip op. 9). The same is true of the temporary revocation of a license required in order to practice one's livelihood (*Barry* v. *Barchi, supra*), and the termination of disability benefits (*Mathews* v. *Eldridge, supra*).

Here, appellee would be required to pay the salary of a reinstated employee pending the outcome of the postdeprivation hearing, but it would receive "the benefit of the employee's labors" (*Loudermill*, slip op. 11). Thus, the deprivation of property is limited by the receipt of value in return for the expenditure of funds. The district court's statement (App., *infra,* 7a) that the reinstatement of an employee could adversely affect office morale does not provide sufficient grounds for requiring a greater degree of procedural protection in the present context. The government may terminate an employee's interest in continued employment after supplying the employee with notice and an opportunity to respond, and the same process is sufficient to protect the employer's correlative interest in removing unsatisfactory employees. Cf. *Loudermill,* slip op. 9-11.[8]

[8] The Court's determination in *Goldberg* v. *Kelly, supra,* that an evidentiary hearing was required prior to the termination of welfare benefits rested on its conclusion that "termination of [welfare assistance] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate" (397 U.S. at 264). Appellee cannot claim that the temporary reinstatement of a discharged employee will place it in similar desperate straits.

Second, the government interest here is quite weighty. In enacting Section 405, Congress was concerned about "the increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth). The anti-retaliation provision "underscore[s] the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action" (*ibid.*). This Court has recognized in other contexts that such anti-retaliation provisions are important means of promoting enforcement of regulatory standards. *NLRB* v. *Scrivener,* 405 U.S. 117, 121-124 (1972); *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960); see also *Donovan* v. *Square D Co.,* 709 F.2d 335, 338 (5th Cir. 1983); *Phillips* v. *Interior Board of Mine Operations Appeals,* 500 F.2d 772, 778, 781 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975).

Congress plainly included temporary reinstatement authority in Section 405 because it believed that the availability of prompt reinstatement would encourage employees to report safety violations. Requiring the Secretary to afford employers an evidentiary hearing prior to temporary reinstatement would interfere with this congressional scheme, resulting in longer periods of unemployment for discharged employees. Since an employee is not likely to be financially able to withstand a long period of unemployment or reduced income (see *Loudermill*, slip op. 9), the elimination of temporary reinstatement necessarily will reduce an employee's willingness to engage in safety-related activity. The rule

adopted by the district court thus discourages the filing of safety complaints by employees and, as a result, undermines Congress's goal of promoting safety in commercial vehicle operations. The district court's decision cannot be squared with this Court's repeated conclusion that the government interest in promoting safety is sufficient to justify limited predeprivation procedures under the Due Process Clause. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 299-303 (1981); *Dixon* v. *Love*, 431 U.S. at 114-115; *Mackey* v. *Montrym*, 443 U.S. at 17-18.

Moreover, requiring a prereinstatement evidentiary hearing would impose additional fiscal and administrative burdens upon the government. The number of hearings undoubtedly would increase under such a rule because an employer would make use of the hearing and any possible appeal to prolong the status quo; "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews,* 424 U.S. at 347; see also *Dixon* v. *Love,* 431 U.S. at 114.

With respect to the third factor identified in *Mathews,* the risk of an erroneous decision, the Labor Department's procedures require that an employer be afforded notice and an opportunity to respond in order to diminish the risk of an erroneous temporary reinstatement order. See page 5 & note 3, *supra.* There is no basis for concluding that additional procedures are required at the prereinstatement stage. Indeed, faced with a due process challenge to the termination of a government employee—involving the identical factual inquiry into the reasons for a discharge—the Court has held that due process does not require a pretermination evidentiary hearing. *Loudermill*, slip op. 12; *Arnett* v. *Kennedy,* 416 U.S. 134, 151-158 (1974) (plurality opinion); *id.* at 167-171 (opinion of Powell, J.).

The district court stated that an evidentiary hearing was needed because dismissals often involve "disputed issues of fact and credibility" (App., *infra*, 8a). But this Court in *Loudermill* acknowledged that "[d]ismissals for cause will often involve factual disputes" (slip op. 9), and concluded that only notice and an opportunity to respond, not an evidentiary hearing, is required prior to the termination of a government employee (*id.* at 12). Here, as in the public employment context, the predeprivation hearing "need not definitely resolve the propriety of the [government action]. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Ibid.*; see also *Barry* v. *Barchi,* 443 U.S. at 65 (the state "need not postpone a suspension [of a horse trainer's license] pending an adversary hearing to resolve questions of credibility and conflicts in the evidence. At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements"); *Mackey* v. *Montrym,* 443 U.S. at 15; *Gerstein* v. *Pugh,* 420 U.S. 103, 119-125 (1975).

Of course, the Due Process Clause requires that the final disposition of the case be preceded by a full and prompt postreinstatement hearing. Thus, this Court has indicated that "[a]t some point, a delay in the [post-deprivation] hearing would become a constitutional violation." *Loudermill,* slip op. 13; *Barry* v. *Barchi*, 443 U.S. at 66. But here the statute itself provides for the necessary postreinstatement procedural protections. Section 405 states that the postreinstatement hearing "shall be expeditiously conducted" and sets a time limit of 120 days after the conclusion of the hearing for issuance of the

post-hearing order. 49 U.S.C. App. 2305(c)(2)(A); see page 6, *supra*. The statutory scheme therefore accords fully with the requirements of due process.[9]

In the final analysis, the Court must determine "when, under our constitutional system, judicial-type procedures must be imposed upon adminstrative action to assure fairness" (*Mathews,* 424 U.S. at 348). In assessing what process is due prior to the issuance of a temporary reinstatement order, substantial weight should be given to the reasonable judgment of Congress that an employer subject to Section 405 should bear the expenses associated with a reasonably disputed discharge pending a final disposition on the merits. *Mathews,* 424 U.S. at 349; see also *Mackey* v. *Montrym,* 443 U.S. at 17.

b. Appellee was accorded all of the predeprivation process required by the Due Process Clause. It is undisputed that the Secretary complied with the statutory directive to "notify the person named in the complaint of the filing of the complaint" (49 U.S.C. App. 2305(c)(1)). Appellee obviously was aware of the relevant factual issues; it had litigated the propriety of the Huffstetler discharge twice before in contract grievance proceedings.[10]

The Secretary's thorough 11-month investigation supplied the "initial check against mistaken decisions" required by the Due Process Clause (*Loudermill*, slip op.

[9] In the present case, appellee never was subjected to a deprivation of property because enforcement of the Secretary's order was enjoined by the district court; appellee accordingly cannot complain of any delay in the statutory hearing. This Court therefore need not consider the permissibility of the length of the delay in this case.

[10] Appellee noted that it was deprived of access to the witness statements and the identities of the witnesses (App., *infra*, 49a). The Secretary declined to disclose the statements on confidentiality grounds. In view of the previous litigation concerning this discharge, however, appellee cannot contend that it was unaware of the parameters of the factual dispute.

12). Moreover, appellee received two opportunities to submit its side of the story prior to the issuance of the Secretary's order. First, appellee supplied the Secretary with a written position paper—accompanied by supporting affidavits—regarding the events surrounding the discharge. Second, appellee's attorneys met with Labor Department officials to present appellee's view of the case. App., *infra*, 45a, 49a; page 7, *supra*. Thus, appellee received the requisite "notice and * * * opportunity to respond" (*Loudermill*, slip op. 12).

The district court's contrary conclusion rests upon its apparent view that "a meaningful opportunity to be heard" automatically requires an evidentiary hearing (see App., *infra*, 9a). In fact, this Court has observed that an evidentiary hearing is "neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews*, 424 U.S. at 348; see also *Mackey* v. *Montrym*, 443 U.S. at 13; *Goss* v. *Lopez*, 419 U.S. at 583. As we have discussed, the general rule is that such a hearing is not required prior to a temporary deprivation of property, so long as a prompt postdeprivation hearing is available under the relevant statutory scheme. The district court did not discuss any reasons that this general rule should not apply in the present context.[11]

2. The question presented in this case clearly warrants review by this Court. The district court's invalidation on constitutional grounds of the temporary reinstatement remedy set forth in Section 405 substantially alters the protection conferred upon motor carrier employees by Congress. Moreover, the effect of the decision below is not

[11] The district court particularly did not explain the reason that it deemed the disclosure of the identity of witnesses and an opportunity for cross examination necessary in this context, even though this Court typically has not found such procedures to be constitutionally required prior to temporary deprivations of property.

limited to the present case. Although appellee did not request certification of a class, the district court's injunction by its terms does not bar only the issuance of temporary reinstatement orders against appellee; it appears to bar the Secretary from issuing a temporary reinstatement order against *any employer*. This Court, however, has made clear that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 410 (1945); cf. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (Mar. 27, 1985), slip op. 10. A district court may not correct putatively unconstitutional action wherever it may occur. Its role is limited to taking whatever steps are necessary to provide full relief to those who have invoked its jurisdiction. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803); cf. *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982).

Thus, because the district court did not certify a plaintiff class, and because no individuals sought to join the action, there is no justification here for nationwide injunctive relief. Of course, once this Court has addressed the merits of appellee's claim, the issue will be resolved for appellants, appellee, and all employers. As a result of the district court's overbroad injunction, however, if this Court should for some reason decline to note probable jurisdiction, the Secretary would never again be able to utilize the statutory temporary reinstatement remedy, and this Court would not have another opportunity to review the correctness of the constitutional analysis applied by the district court.

In addition, the constitutional question decided by the district court does not arise only in the present context. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), bars mine operators from discriminating

against miners in retaliation for the miners' health or safety complaints. The statute provides that if the Secretary of Labor finds that a complaint alleging such retaliation was not "frivolously brought," the Secretary may apply to the Federal Mine Safety and Health Review Commission for an order requiring the reinstatement of the miner (30 U.S.C. 815(c)(2)). The Commission's regulations closely resemble the procedures set forth in Section 405, authorizing the issuance of a temporary reinstatement order on the basis of the Secretary's application, to be followed by a prompt postreinstatement evidentiary hearing. See 29 C.F.R. 2700.44. The Sixth Circuit recently held that the issuance of a temporary reinstatement order without a prior evidentiary hearing violates the mine operator's procedural due process rights. *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (6th Cir. 1985). Thus, the question presented in this case is closely related to the constitutionality of the temporary reinstatement remedy under this separate federal program. For these reasons, review by this Court plainly is warranted.

CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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MARCH 1986

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, U.S. DEPARTMENT OF LABOR

ORDER

The above-styled matter is presently before the court on plaintiff's motion for summary judgment. Plaintiff attached to its motion for summary judgment a "Statement of Material Facts as to which there is No Genuine Issue to be Tried", as required by L.R. 220-5(b)(1) (N.D. Ga.). The defendant neither responded to nor controverted those facts. Thus, Roadway's Statement of Facts shall be deemed admitted. L.R. 220-5(b)(2) (N.D. Ga.).

STATEMENT OF FACTS

Plaintiff Roadway Express, Inc. ("Roadway") is a common motor carrier, engaged in interstate trucking through the operation of commercial motor vehicles, which are used to transport cargo.

On November 22, 1983, Roadway discharged employee Jerry Hufstetler for an alleged act of dishonesty. Soon thereafter, Hufstetler filed a grievance, pursuant to the

the provisions of the National Master Freight Agreement ("NMFA"), a collective bargaining agreement made between Roadway and the Teamsters Local Union No. 528. Hufstetler contended that he was dismissed in retaliation for his reporting of violations of commercial motor vehicles rules and regulations.

On December 19, 1983, Hufstetler's grievance was heard before an arbitration panel established under the terms of the NMFA. That panel deadlocked, and, as dictated by the NMFA, the case was referred to a second level arbitration panel. The panel was composed of an equal number of representatives from a company and a union, none of which was a representative of the plaintiff. After considering evidence presented by both Hufstetler and Roadway, the second panel rejected Hufstetler's contentions and sustained his discharge for an act of dishonesty.

Hufstetler filed subsequently a complaint with the United States Department of Labor ("DOL"), alleging that he had been discharged without just cause, in violation of the NMFA and section 405 of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305, which prohibits, *inter alia,* retaliatory discharge for the reporting of safety violations.

Pursuant to 49 U.S.C. § 2305(c)(2)(A), DOL investigated Hufstetler's complaint. The procedures utilized included a field investigation by an employee of DOL, a review of the investigator's report by a regional supervisory investigator, and, where the supervisor found the complaint meritorious, review by the Occupational Safety and Health Administration's regional administrator.

During the investigation, Roadway submitted, as requested, a written position statement explaining the circumstances of the discharge. However, Roadway was denied access to confidential statements of witnesses, and was denied the names of those individuals from whom statements were taken. Roadway thereby informed DOL

that any preliminary order requiring Hufstetler's reinstatement, prior to an evidentiary hearing, would constitute a denial of due process as guaranteed by the Fifth Amendment to the United States Constitution.

DOL determined, after eleven months of investigation, that there was reasonable cause to believe that Hufstetler was discharged in violation of 49 U.S.C. § 2305. On January 21, 1985, the Secretary of DOL thereby issued a preliminary order, pursuant to 49 U.S.C. § 2305(c)(A), which required, *inter alia,* that Roadway immediately reinstate Hufstetler to his former position.

Prior to the issuance of the preliminary order, DOL did not conduct an evidentiary hearing to resolve disputed factual issues which were raised by the evidence. However, under 49 U.S.C. § 2305(c)(2)(A), DOL was not so required. It is this alleged infirmity in the statute which is the crux of this litigation.

Roadway filed suit on February 1, 1985, challenging the provisions of 49 U.S.C. § 2305(c)(2)(A), and seeking injunctive and declaratory relief. In addition to seeking relief from this court on constitutional grounds, Roadway filed, before an Administrative Law Judge ("ALJ"), objections to that part of DOL's order which held that Hufstetler was wrongfully discharged. The ALJ has not yet rendered a decision as to the merits of Hufstetler's discharge.

On February 11, 1985, this court granted Roadway's motion for preliminary injunction. *Roadway Express, Inc. v. Donovan*, 603 F. Supp. 249 (N.D. Ga. 1985). The court found that Roadway proved the four elements necessary for the issuance of a preliminary injunction. Specifically, the court found preliminary injunctive relief warranted because Roadway showed: 1) a substantial likelihood of success on the merits, 2) the possibility of irreparable harm, 3) a comparatively greater possibility of harm than that of DOL, and 4) no adverse effect to the public in-

terest. *Roadway*, 603 F. Supp. at 252-53. The court thereby restrained DOL from enforcing that portion of its January 21 preliminary order which required Roadway to temporarily reinstate Hufstetler without benefit of an evidentiary hearing.

Following this court's entry of a preliminary injunction, Roadway moved for summary judgment, seeking a final order of injunctive and declarative relief.

JURISDICTIONAL ISSUES

DOL contends that summary judgment is not appropriate inasmuch as Roadway has failed to exhaust available administrative remedies. DOL alleges that the resolution of the constitutional question is dependent upon the compilation of an appropriate record for review pursuant to administrative procedures.

Roadway's complaint is based upon the premise that there is no available administrative remedy prior to DOL's order. It is this prehearing deprivation of a property right for which Roadway seeks relief.

It is well-established that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures." *Califano v. Sanders*, 430 U.S. 99, 109, 97 S. Ct. 980, 986 (1977). This is especially true when an adequate factual record has been compiled and the special expertise of the administrative agency is unnecessary for resolution of the collateral constitutional issues. *See, McKart v. United States*, 395 U.S. 185, 193-94, 89 S. Ct. 1657, 1662-63 (1969); *Southern Ohio Coal Co. v. Donovan*, No. 84-3910, slip op. (6th Cir. Oct. 2, 1985). Thus, inasmuch as Roadway's due process claim is collateral to the substantive claims presently before the ALJ, and the expertise of the administrative agency is, in this instance, unavailable, jurisdiction in the district court is warranted. *Mathews v. Eldridge*, 424 U.S. 319, 330-32, 96

S.Ct. 893, 900-01 (1976); *Cherry v. Heckler*, 760 F.2d 1186, 1190 (11th Cir. 1985); *Southern Ohio Coal*, slip op. at 14-16.

Additionally, it is clear that "this issue is live and in dispute between the parties. The plaintiff remains in the [trucking] business and continues to be exposed to procedures which, it alleges, deprive it of due process. The Court is satisfied that this action continues to present an 'actual controversy' that is appropriate for declaratory relief." *Southern Ohio Coal v. Donovan*, 593 F. Supp. 1014, 1021 (S.D. Ohio 1984). *See, Powell v. McCormack*, 395 U.S. 486, 517-18, 89 S. Ct. 1944, 1961-62 (1969). The governmental policy is definite, settled, and presently affecting Roadway's interests; hence, declaratory relief in the district court is appropriate. *Florida Board of Business Regulation v. National Labor Relations Board*, 605 F.2d 916, 919 (5th Cir. 1979).

In the alternative, DOL contends that the Court of Appeals rather than the district court has jurisdiction to review an order issued pursuant to 49 U.S.C. § 2305(c).

However, the statutory scheme is clear. 49 U.S.C. § 2305(d)(1) provides, in part: "Any person adversely affected or aggrieved by an order issued *after a hearing* under subsection (c) of this section may obtain review of the order in the United States Court of Appeals for the circuit in which the violation. . . allegedly occurred. . . [emphasis supplied]." Thus, this code section grants the Court of Appeals appellate jurisdiction only of substantive claims following a hearing on the merits, and is therefore inapposite to the matter before this court.

Having found that jurisdiction is properly invoked in this court, the sole issue remains: whether 49 U.S.C. § 2305(c)(2)(A), which requires, prior to an evidentiary hearing, immediate reinstatement of discharged employees, upon the Secretary's finding of wrongful discharge, is unconstitutional and violative of the Fifth Amendment to the United States Constitution.

PROCEDURAL DUE PROCESS

The Fifth Amendment to the United States Constitution assures that no person shall be deprived of property without due process of law. An essential and fundamental requirement of due process is that notice and an opportunity to be heard *precede* deprivation of a significant property interest, *Mullance v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656 (1950), except for extraordinary situations where important governmental interests justify postponing the hearing until after deprivation. *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786 (1971); *see Cleveland Board of Education v. Loudermill*, ____ U.S. ____ 105 S. Ct. 1487, 1493 (1985).

The parties agree that a balancing test, as prescribed and applied by the United States Supreme Court in *Mathews v. Eldridge*, is necessary for determining whether procedures used in the deprivation of a property right comport with the requirements of due process. Thus, in determining the constitutionality of 49 U.S.C. § 2305(c)(2)(A), the court must consider: the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and, the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail. *Mathews*, 424 U.S. at 335.

The private interest: This court, on Roadway's motion for preliminary injunction, found that Roadway has important interests in not being compelled to reinstate an employee discharged for wrongful conduct and in upholding the arbitration provisions of its bargaining agreement. DOL argues nevertheless, that Roadway's interests are insubstantial, inasmuch as the statute requires that a post-reinstatement hearing be "expeditiously con-

ducted". DOL contends that Roadway would be subject to, at most, a 120 day reinstatement order without benefit of hearing.

In *Southern Ohio Coal*, slip op., the Sixth Circuit Court of Appeals addressed a provision of the Federal Mine Safety and Health Act which required pre-hearing reinstatement in the same manner as the statute involved herein. The court held that an order requiring reinstatement for five days prior to a hearing violated the procedural due process rights of the employer. The Sixth Circuit reasoned that "[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Southern Ohio Coal*, slip op. at 18 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168, 94 S. Ct. 1633 (Powell, J. concurring) (1974).

In this instance, the arbitration panel, after a lengthy hearing, sustained Hufstetler's discharge for an act of dishonesty. The statutory scheme however, required Roadway to reinstate, for possibly a four-month period, an arguably unsatisfactory employee, in violation of its collective bargaining agreement and at the expense of innocent employees. Certainly, Roadway's interests in not doing so are substantial.

The risk of erroneous deprivation: The court found previously a clear risk of erroneous deprivation, inasmuch as the credibility and veracity of witnessess was not available to Roadway for scrutiny and cross-examination. *Roadway*, 603 F. Supp. at 252.

During its investigation, DOL requested and received from Roadway a written position statement, but failed to make available the names and statements of witnesses upon which its decision was based. "[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the [employer] to mold his argument to the

issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many [discharge] proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970). *See also Mathews*, 424 U.S. at 343-44.

Dismissals for cause often, as in this case, involve disputed issues of fact. *Loudermill*, 105 S. Ct. at 1494. Even where the facts are not in dispute, the appropriateness of the discharge might be questioned, and the only meaningful opportunity to be heard is before the reinstatement order. *Id.* Thus, the procedures used by DOL were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. *Southern Ohio Coal.* slip op. at 19. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation.

The governmental interest: This court concluded on motion for preliminary injunction that the governmental interest in protecting employees from retaliatory discharge would not be impaired by requiring a hearing prior to reinstatement. *Roadway*, 603 F. Supp. at 252.

Although the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid, DOL has failed to show any compelling considerations which necessitate postponing the hearing.

Inasmuch as the statute requires presently that a hearing be "expeditiously conducted" after reinstatement, the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible. *Loudermill*, 105 S. Ct. at 1495; *Southern Ohio Coal*, slip op. at 17.

The court notes that a full evidentiary hearing prior to reinstatement is not required. *Mathews*, 424 U.S. at 343. Rather, it is sufficient that an employer be given, at

minimum, an opportunity to present his side and a chance to confront and cross examine witnesses. *Southern Ohio Coal*, slip op. at 21.

CONCLUSION

Considering the private and governmental interests involved, and the present risk of erroneous deprivation, the court concludes that the statutory procedures utilized by DOL do not conform to the dictates of due process. To the extent that the statute fails to provide employers with a meaningful opportunity to be heard, it fails to meet the requirements of due process. Such deficiency may only be remedied by conducting a hearing, prior to an order of reinstatement, whereby the parties are given a meaningful opportunity to be heard prior to the Secretary's decision.

In summary, the court determines that the plaintiff's motion for summary judgment is meritorious, and the motion is hereby granted. It is the judgment of this court and it is declared that the Secretary's preliminary order of January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires the plaintiff to temporarily reinstate Hufstetler prior to an evidentiary hearing, and that portion is therefore void. It is declared further that 29 U.S.C. § 2305(c)(2)(A) is unconstitutional and void to the extent that it empowers defendants to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the defendants, and any of their officers, agents, and anyone acting in active concert therewith, are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. § 2305(c)(2)(A), without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process under the Fifth Amendment to the United States Constitution.

SO ORDERED, this 18 day of November, 1985.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge,
UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.

v.

RAYMOND J. DONOVAN AND ALAN C. MCMILLAN

ORDER

The above-styled action is presently before the court on the plaintiff's motion for a temporary restraining order or for a preliminary injunction to order the defendants to withdraw that portion of the Secretary of Labor's preliminary order which requires the plaintiff to reinstate previously discharged employee Jerry W. Hufstetler. The plaintiff contends that the preliminary order is unconstitutional because it violates the plaintiff's right to procedural due process as guaranteed by the Fifth Amendment to the United States Constitution. After a hearing the parties have agreed that the present motion be treated as a motion for preliminary injunctive relief.

Prior to his dismissal on November 22, 1983, Jerry Hufstetler worked as a driver for the plaintiff. He was dismissed for allegedly intentionally creating a breakdown of his vehicle in order to collect compensation for the time he spent awaiting repair of the vehicle. Five days later Hufstetler filed a grievance, alleging that he had been discharged without just cause, in violation of the National Master Freight Agreement ("NMFA"). A NMFA arbitra-

tion panel considered the testimony presented by both Hufstetler and the plaintiff. The panel was composed of an equal number of representatives from a company and a union, none of which was a representative of the plaintiff. The panel rejected Hufstetler's claim that he had been dismissed in retaliation for his reporting of safety violations and determined that he had committed an act of dishonesty.

Subsequently Hufstetler contacted the Department of Labor and claimed that he had been dismissed for reporting safety violations, in violation of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305. The Secretary then conducted an investigation and determined that there was reasonable cause to believe that Hufstetler's complaint had merit. On January 21, 1985, the Secretary issued a preliminary order that required the plaintiff, *inter alia*, to pay backpay and to reinstate Hufstetler.

The plaintiff contends that the Secretary's preliminary order, issued pursuant to 49 U.S.C. § 2305(c)(2)(A), violates its right to procedural due process and causes the plaintiff to experience irreparable harm. Section 2305(c)(2)(A) provides that after the Secretary has issued a preliminary order either the employee or the employer within thirty days may file objections to the preliminary order and request a hearing, which is to be "expeditiously conducted." The statute specifically states that the request for a hearing does not stay that portion of the preliminary order that provides for reinstatement of an employee. After the conclusion of the requested hearing, the Secretary is to issue a final order within one hundred and twenty days.

To be entitled to preliminary injunctive relief, the movant must prove four elements: (1) there is a substantial likelihood that the movant will prevail on the merits; (2) the movant will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction would not be adverse to the public interest. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984). The requirement that the movant make a showing that there is a substantial likelihood of prevailing on the merits does not mean that the movant must actually succeed on the merits. *See Johnson v. United States Department of Agriculture*, 734 F.2d 774, 782 (11th Cir. 1984). The issue is "likelihood" of success. *Id.*

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "At a minimum, due process assures notice and a meaningful opportunity to be heard before a right or interest is forfeited." *Johnson*, 734 F.2d at 782. In *Mathews*, 424 U.S. at 335, the United States Supreme Court stated that three factors should be considered in determining the scope of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The balancing test outlined in *Mathews* requires a court to consider various factors. Although due process generally requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest, a deprivation is not unconstitutional if the "potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to

minimize the risk of erroneous determination." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19 (1978). Deprivation is also permissible if it is necessary to prevent imminent danger to the public. *See Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 300 (1981); *Burnley v. Thompson*, 524 F.2d 1233, 1241 (5th Cir. 1975).

Although no appellate court has examined the constitutionality of 49 U.S.C. § 2305(c)(2)(A), a federal district court has considered the constitutionality of regulations similar to the statute in the present case. *See Southern Ohio Coal Company v. Donovan*, No. C-2-78-1041, slip op. at 16-24 (S.D. Ohio Sept, 7, 1984) ("Southern Ohio"). In *Southern Ohio* an employer challenged the constitutionality of procedures employed by the Mine and Health Review Commission, 29 C.F.R. §§ 2700 *et. seq.* The employer contended that it was deprived of procedural due process when the Commission issued an *ex parte* order reinstating a discharged coal miner who had been dismissed for excessive absenteeism and who had alleged that he was discharged in violation of federal mine safety laws. The challenged regulations provided that when the Secretary issues an order of temporary reinstatement the employer may request a hearing and that a judge is to hold the requested hearing within five days. After considering the constitutionality of the regulations, the court declared that a hearing provided to an employer after five days of compelled reinstatement failed to meet the requirements of procedural due process, as articulated by the Supreme Court in *Mathews*. In an earlier decision involving the same parties, the court had granted injunctive relief to the employer who sought to enjoin enforcement of the order requiring reinstatement. *See Southern Ohio Coal Company v. Marshall*, 464 F. Supp. 450, 456 (S.D. Ohio 1978).

For relief to be proper in the present case, the plaintiff must satisfy the four elements of preliminary injunctive relief. The court will consider the elements seriatim.

1. Likelihood of Success on the Merits

The plaintiff's challenge to the constitutionality of 49 U.S.C. § 2305(c)(2)(A) requires this court to consider the three factors articulated by the Supreme Court in *Mathews*: the private interest affected by the government's action, the risk of erroneous deprivation, and the government's interest. 424 U.S. at 335. In determining the plaintiff's interest, the court recognizes that property interests "are not created by the Constitution, [but rather] they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Arnett v. Kennedy*, 416 U.S. 134, 151 (1974), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The plaintiff has an important interest in not being compelled to reinstate an employee that was dismissed for dishonest conduct; that was determined by an arbitration panel, as provided by the contract between the plaintiff and its employees, to be justly dismissed; that could cause the plaintiff to be subject to further acts of dishonesty; and that might cause an innocent employee to be replaced. The plaintiff has an interest in upholding the arbitration provision of its contract and in protecting its business by promptly discharging "deficient employees." *Burnley*, 524 F.2d at 1241. *See also Southern Ohio*, 464 F. Supp. at 456 (employer has a compelling interest in not reinstating person in supervisory position).

There is also a clear risk of erroneous deprivation of the plaintiff's interest in protecting its business. In the present case, the Secretary of Labor conducted an investigation,

which included an examination of the plaintiff's written statement of its view of the facts. The names of the people that the Secretary questioned were not made available to the plaintiff. In a case such as this one, where the employee claims that he was dismissed in retaliation for reporting safety violations and where the employee was determined to have acted dishonestly, an evidentiary hearing prior to compelled reinstatement would clearly lessen the risk of erroneous deprivation because the credibility and veracity of the witnesses would be determined. *See generally Mathews*, 424 U.S. at 344.

The government's interests in protecting employees from retaliation for the reporting of safety violation and in protecting the public by the promotion of safety would not be impaired by requiring that a hearing be conducted prior to reinstatement. Although this court recognizes that the findings of an arbitration board that are not appealed are not to be given res judicata or collateral estoppel effect [*see McDonald v. City of West Branch, Michigan*, 104 S. Ct. 1799, 1802 (1984)], the process afforded the plaintiff and the employee during arbitration is significantly more expansive than the process afforded by the Secretary during his investigation. In addition, the government does not incur any greater burden by being required to hold a hearing prior to deprivation because § 2305(c)(2)(A) already requires it to "expeditiously" conduct the requested hearing. Futhermore, there is no imminent danger to the public requiring the plaintiff to be deprived of its right to procedural due process. The decision of the arbitration panel, however, suggests that there is a clear risk of erroneous deprivation.

After considering the three factors for determining the scope of due process required by *Mathews*, the court finds

that the plaintiff has shown a substantial likelihood of success on the merits of its claim attacking the constitutionality of 49 U.S.C. § 2305(c)(2)(A).

2. Irreparable Harm

The plaintiff maintains that it will incur irreparable harm, harm that cannot be remedied by an award of monetary damages. The plaintiff contends that even if the Secretary determines after a hearing that Hufstetler was properly dismissed it will have been denied not only its right to procedural due process, but it will have also experienced interference with its collective bargaining agreement, disruption in its business caused by low morale and the layoff of an innocent employee, and apprehension of further acts of dishonesty. The harm that the plaintiff would be exposed to if an injunction were not granted would clearly be irreparable under the circumstances of this case.

3. Comparative Harm

The plaintiff argues that the harm caused by compelled reinstatement is greater than any harm that the defendants and Hufstetler would experience if a preliminary injunction were granted. Although the Secretary does have an interest in upholding the validity of statutes designed to promote safety, the court recognizes that the requirement of a hearing prior to ordered reinstatement would nonetheless protect the defendants' interest in promoting safety. The harm experienced by the plaintiff, however, is much greater because reinstatement would adversely affect its business, as discussed above, and only injunctive relief can adequately protect the plaintiff's interest, in contrast to Hufstetler's interest, which can be protected by an award of backpay and other benefits if the decision of the Secretary is favorable to him.

4. Public Interest

The plaintiff contends that the issuance of a preliminary injunction would not be adverse to the public interest because the granting of the injunction does not undermine the promotion of safety, but rather only requires the government to conduct its hearing prior to compelling reinstatement. The plaintiff maintains that the burden on the government to conduct the requested hearing prior to the ordering of reinstatement is minimal, but the burden on businesses forced to reinstate employees dismissed for dishonesty is great. By requiring a hearing prior to compelling reinstatement, the court would be protecting both the public's interest in safety and in promoting the plaintiff's business interests. In considering the facts of this case, the court finds that the issuance of a preliminary injunction would not be adverse to the public's interest.

In conclusion, the court finds that the plaintiff has proved the four elements necessary for the issuance of a preliminary injunction. Although the court is not insensitive to Hufstetler's economic status as a result of the awarding of injunctive relief, it nevertheless believes that the particular circumstances of this case make such an award equitable as well as legally necessary.

The defendants, and any of their officers, agents and anyone acting in active concert therewith, are hereby restrained and enjoined from enforcing that portion of the Secretary's preliminary order of January 25, 1985 which requires the plaintiff to temporarily reinstate Hufstetler. The plaintiff is hereby required as a condition of the above restraint to post a bond in the penal sum of $30,000.00 with good security, said bond to secure the payment of any and all damages that may accrue to any party as a result of the erroneous issuance of this order. The restraint imposed

herein shall not become effective unless and until said bond is posted and approved as to form and security by the clerk of this court.

SO ORDERED, this 11 day of February, 1985.

/s/ G. Ernest Tidwell

G. ERNEST TIDWELL
Judge,
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR

IN THE MATTER OF:

ROADWAY EXPRESS, INC./JERRY W. HUFSTETLER

Section 405 Complaint, Case No.: 4-0280-84-503

SECRETARY'S FINDINGS AND PRELIMINARY ORDER

Pursuant to Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter, "STAA") (49 U.S.C. 2305), Complainant Jerry W. Hufstetler filed a complaint with the Secretary of Labor alleging that Respondent, Roadway Express, Inc., discriminatorily fired Complainant as reprisal for complaining about DOT safety violations, (breakdowns). Respondent denied the allegation. Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator, Region IV, of the Occupational Safety and Health Administration, pursuant to Section 405 of STAA, Secretary's Order 9-83, 48 F.R. 35736 (August 5, 1983), and CPL 2.45, Chapter X (March 8, 1984) finds that there is reasonable cause to believe the following:

1. (a) Respondent, Roadway Express, Inc., is engaged in interstate trucking as a part and portion of their business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to transport cargo. Consequently, Respondent is subject to the STAA.

(b) Respondent, at all times material herein, has been a person as defined in Section 401(4) of STAA (49 U.S.C. 2301(4)).

2. (a) In April, 1977, Respondent hired Complainant Hufstetler to his position as a driver of a commercial motor vehicle, to wit, a tractor-trailer with a gross vehicle weight rating in excess of 10,000 pounds.

(b) At all times material herein, Complainant Hufstetler was an employee within the meaning of the STAA, in fact he was a driver of a commercial motor vehicle used on the highways in interstate commerce to transport goods and products and in that he was employed by a commercial motor carrier, and in the course of this employment, directly affected commercial motor vehicle safety (Section 401(2)(A) of STAA, 49 U.S.C. 2301(2)(A).

3. (a) On or about February 7, 1984, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of Section 405 of STAA (49 U.S.C. 2305(C)(2)(A). This complaint was timely filed.

(b) The Secretary, acting through his duly authorized agents, thereafter investigated the above complaint in accordance with Section 405 of STAA (49 U.S.C. 2305(C)(2)(A)), and has determined that there is reasonable cause to believe that the Respondent has violated Section 405(a) of STAA.

4. On or about November 22, 1983, Respondent notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, principally because he allegedly had created a false breakdown, an act of dishonesty, on November 22, 1983. Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.

5. Complainant had a two year history of bringing vehicle safety problems to the attention of the Respondent and had complained to DOT and to elected public officials. These complaints constitute protected activity under the Act.

6. Respondent had warned Complainant and threatened to get him due to his excessive breakdowns due to Complainant's recognition of safety violations.

7. Respondent's termination of Complainant's employment was discriminatorily motivated by Complainant's protected activity. Thus, Respondent's discharge was a violation of Section 405(a) of STAA (49 U.S.C. 2305(a)).

8. Complainant's backpay is to be calculated from the date of his discharge, November 22, 1983, up to and including the date he either finds new employment or refuses reinstatement with Roadway Express, Inc., whichever comes first. Backpay is to be calculated and paid at $997.00 per week, which was Mr. Hufstetler's average weekly pay prior to his termination, plus 10% interest per annum on the entire amount owed.

JANUARY 21, 1985
Date

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

ORDER

Pursuant to Section 405(c)(2)(A) of the Act, the Secretary of Labor, acting through his agent, in accordance with the findings made herein, orders Respondent, Roadway Express, Inc., to immediately offer reinstatement to Jerry W. Hufstetler to his former position of employment with accumulated seniority; to compensate him for backpay in an amount based on the terms of paragraph 8 of the Findings and to expunge from his personnel records any adverse references to his discharge or any protected activity.

/s/ ALAN C. MCMILLAN
Alan C. McMillan
Regional Administrator

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA – ATLANTA DIV.

C85-997A

ROADWAY EXPRESS, INC.

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR &
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR

Decision by Court. This action came on for consideration before the Court with Honorable G. Ernest Tidwell, judge presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment is granted. Accordingly, defendants are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 USC 2305(c)(2)(A) without first conducting evidentiary hearing. Judgment entered for plaintiff, ROADWAY EXPRESS, INC. against defendants, RAYMOND J. DONOVAN, Secretary of Labor and ALAN C. MCMILLAN, Regional Administrator Region Four U.S. Dept. of Labor, for costs.* * *

Filed and entered in clerk's office November 18, 1985
Luther D. Thomas, Clerk

/s/ DIANE TAYLOR
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION, PLAINTIFF-APPELLEE,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S DEPARTMENT OF LABOR,
DEFENDANTS-APPELLANTS

NOTICE OF DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 2101(a) (1985) and Sup.Ct.R. 10, William E. Brock, Secretary of Labor and Alan C. McMillan, Regional Administrator, Region Four, U.S. Department of Labor, through their attorney, the United States Attorney for the Northern District of Georgia, file this Notice of Appeal of the order and judgment of the District Court in the above-styled case, entered on November 18, 1985. Appeal is taken directly to the United States Supreme Court pursuant to 21 U.S.C. § 2101 (1985). Service is being made at the time of this filing on Michael C. Towers and John B. Gamble, Jr., Fisher and Phillips, 3500 First Atlanta Tower, Atlanta, Georgia 30383.

An affidavit of proof of service is attached.

Respectfully submitted,

LARRY D. THOMPSON
United States Attorney

J. WILLIAM BOONE
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring St., S.W.
Atlanta, Georgia 30335
Georgia Bar No. 067856

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC.,
A DELAWARE CORPORATION, PLAINTIFF-APPELLEE,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND
ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR,
REGION FOUR, U.S DEPARTMENT OF LABOR,
DEFENDANTS-APPELLANTS

AFFIDAVIT OF PROOF OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

Before the undersigned officer duly authorized to administer oaths, personally appeared J. William Boone, who being duly sworn deposes and states as follows:

1

I, J. William Boone, am an Assistant United States Attorney for the Northern District of Georgia and am one of the attorneys in the case of Roadway Express, Inc., a Delaware Corporation v. William E. Brock, Secretary of Labor and Alan C. McMillan, Regional Administrator, Region Four, U.S. Department of Labor.

2.

Pursuant to Sup.Ct.R. 28.2 and 28.5(c), I certify that on the 17th day of December, 1985, one copy of the Defendants-Appellants' Notice of Direct Appeal to the U.S. Supreme Court of the district court's order, opinion, and judgment of November 18, 1985, in the above case was mailed by depositing it in U.S. Postal facilities, first-class postage prepaid, to Michael C. Towers and John B. Gamble, Jr., Fisher and Phillips, 3500 First Atlanta Tower, Atlanta, Georgia 30383.

3.

All parties required by Sup.Ct.R. 28.4(a) to be served have been served.

Further affiant saith not.

LARRY D. THOMPSON
United States Attorney

J. WILLIAM BOONE
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring St., S.W.
Atlanta, Georgia 30335
Georgia Bar No. 067856

APPENDIX F

U.S. Department of Labor
Office of Administrative Law Judges
Suite 901 1001 Howard Avenue
New Orleans, LA 70113

85-STA-8

IN THE MATTER OF
JERRY W. HUFSTETLER, COMPLAINANT
ROADWAY EXPRESS, INC. RESPONDENT
JERRY W. HUFSTETLER
Pro se
DAVID E. JONES, ESQ.
FOR THE U.S. DEPT. OF LABOR
MICHAEL C. TOWERS, ESQ.
MICHAEL D. CULLINS, ESQ.
FOR THE RESPONDENT
BEFORE: JAMES W. KERR, JR.
ADMINISTRATIVE LAW JUDGE

RECOMMENDED DECISION AND ORDER

This is a proceeding by Complainant, Jerry W. Hufstetler, for reinstatement, back pay and all other terms, conditions and privileges of his former employment by Roadway Express, Inc., pursuant to the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2301, *et seq.*, hereinafter referred to as "the Act". A hearing was conducted in Sarasota, Florida, March 26 through 29, 1985, at which time all parties were afforded the opportunity to offer documentary evidence and testimony, examine and cross-examine witnesses, make oral arguments

and to submit written briefs and proposed findings of fact and conclusions of law in support of their respective positions. Based upon all evidence admitted at the hearing and the post-hearing submissions, the following findings and conclusions are made.[1]

In order to permit post-hearing development of evidence regarding mitigation of damages, the record in this case closed September 1, 1985.

FINDINGS OF FACT

1. Respondent, Roadway Express, Inc., operates commercial motor vehicles with a gross weight rating of 10,000 pounds or more which are assigned to drivers to transport cargo in interstate commerce.

2. Complainant was employed by Respondent in April 1976 at the Atlanta, Georgia terminal as a road driver or line haul driver. He was transferred approximately one year later to the Roadway terminal in Lake Park, Georgia.

3. On or about August 1979, Archie Jenkins assumed the position of relay manager at Respondent's Lake Park, Georgia, terminal. Several coordinators, dispatchers and approximately 60 road drivers, including Complainant, were under the supervision of Mr. Jenkins.

4. Prior to October 1982, Complainant's "breakdown" record was not unusual compared to other road drivers assigned to the Lake Park, Georgia, terminal. A "breakdown" occurs when the need for mechanical repairs prevents a tractor trailer from being operated in compliance with the U.S. Department of Transportation, Federal Highway Administration, Federal Motor Carrier Safety Regulations, regardless of whether the condition renders a truck inoperable. Drivers for Respondent

[1] References herein to the transcript are designated "Tr." References to Department of Labor exhibits are "P." and Respondent's exhibits are "D.".

prepare daily logs, the originals of which are given to the company with the drivers maintaining carbon copies. In addition to the information required by the logs, Complainant also entered notations describing his breakdowns.

5. Respondent compensates its road drivers at the rate of $13.15 per hour for breakdowns. The road drivers earn between $15.00 and $16.00 per hour while actually driving their trucks. The Department of Transportation Safety Regulations require that a road driver may not be on duty for more than 70 hours in any eight day period. Breakdown time is counted toward the maximum on duty time unless the driver is relieved of duty during that period. A driver is paid $13.15 per hour even though he has been relieved of duty during a breakdown. A breakdown may cause a driver to lose the opportunity of taking a longer, more profitable trip.

6. On October 30, 1982, a coordinator dispatched Complainant, over his objection, from the Lake Park terminal with a trailer having a broken main spring. Subsequently, the Florida Highway Patrol issued a mandatory repair order for this safety defect and Complainant incurred approximately 25 hours of breakdown time. Complainant wrote a letter to the Director of the Federal Highway Administration complaining about being dispatched with a broken main spring. Also, he filed a union grievance due to Respondent's failure to pay him during the breakdown time.

7. While returning to the Lake Park terminal after the broken spring had been repaired, a problem developed with the brake lights on the truck. The Lake Park relay dispatcher ordered Complainant to "bring his unit home" and Complainant proceeded to his personal residence. When Mr. Jenkins learned that the Complainant had taken the truck to his house rather than to the Lake Park terminal, he issued Complainant a warning letter.

Mr. Jenkins was later discharged for unacceptable job performance, though there is no evidence that this incident was involved in the decision to remove him.

8. On November 27, 1982, Complainant discovered a flat tire on his tractor in De Land, Florida. A temporary repair was made but the tire again went flat during the trip to Lake Park. Claimant telephoned the relay dispatcher and informed him of the problem. The dispatcher instructed Complainant to proceed to Lake Park with the flat tire, notwithstanding a company policy prohibiting driving under such circumstances. Complainant filed a complaint with the FHA concerning this incident.

9. On December 2, 1982, Complainant wrote a letter to Respondent's Chairman of the Board, Mr. Charles Zodrow, complaining about the lack of concern for safety by Mr. Jenkins and the dispatcher in connection with the broken main spring and the flat tire. Mr. Jenkins knew of Complainant's communication to a company official.

10. On January 16, 1983, Complainant discovered that his brake lights were not working. As the truck could not be repaired by mechanics sent by the dispatcher, the truck was towed to the relay terminal.

11. On January 19, 1983, after Complainant's truck had been inspected prior to dispatch by a Roadway employee, Complainant discovered a broken main spring. The spring was changed after Complainant brought the matter to the attention of the dispatcher.

12. Mr. Jenkins had knowledge of Complainant's breakdowns. At a union/management meeting January 20, 1983, Mr. Jenkins stated that if Complainant was not careful, the breakdowns could get him into trouble. This comment was interpreted by at least one official as meaning that Complainant's breakdowns might result in his discharge.

13. On January 25, 1983, Mr. Jenkins issued Complainant a warning letter concerning the positioning of the CB radio on the dash of his cab. This resulted in Com-

plainant filing a union grievance contending that the position of the CB radio did not obstruct the driver's vision in violation of DOT safety regulations.

14. On May 23, 1983, Mr. Jenkins issued a warning letter to Complainant, accusing him of exceeding the speed limit to Roadway's St. Petersburg, Florida, terminal. The time clock at that terminal has a history of being innaccurate, which is known by Respondent. Three other Roadway drivers were given citations for speeding by the Florida Highway Patrol, but were not issued letters of reprimand. Complainant filed a union grievance concerning the letter issued to him.

15. On June 12, 1983, Complainant filed a union grievance concerning whether a driver could be required to pull a trailer having defective marker lights. He supplemented this grievance August 24, 1983, by attaching a response from the FHA, citing the applicable DOT safety regulations that all marker lights are required to work and that violations are punishable against the driver, the motor carrier, or both. The record supports the conclusion that Mr. Jenkins knew about this grievance.

16. On June 10, 1983, June 18, 1983, July 8, 1983 and July 20, 1983, Complainant continued to have problems with trailers having malfunctioning lights. On each date he reported the specific problem and was advised either to continue with the trip or that there was no requirement that the lights work.

17. On June 18, 1983, Complainant wrote a letter to the headquarters office of Roadway Express, informing the company of Mr. Jenkins' lack of concern for safety and compliance with the DOT safety regulations.

18. On July 2, 1983, Complainant, who was in Gainesville, Florida, had reached the maximum allowable driving time permitted by the DOT safety regulations. Complainant stopped at a motel with which Roadway had no credit; however, there was no violation of a company

policy or the collective bargaining agreement. When Complainant informed the Lake Park dispatcher that he had reached the maximum allowable driving time, he was directed by Mr. Jenkins to drive to another motel, causing him to exceed the maximum driving time by 2.25 hours. Complainant filed a union grievance, requesting payment for the driving and delay time incurred. He also filed a complaint with the FHA for exceeding the maximum driving time.

19. On August 6, 1983, Respondent issued a warning letter to Complainant for exceeding the company imposed running time on a trip from Miami, Florida, to Valdosta, Georgia. Complainant followed the route prescribed by Respondent but was delayed due to construction. Two other drivers reduced their time by driving off route across Alligator Alley, a toll road. A driver is subject to being issued a warning letter for driving off route, but Respondent reimbursed those drivers for their tolls and failed to issue warning letters. Complainant protested this incident by filing another union grievance.

20. In August, 1983, Complainant experienced a broken clutch while enroute to the St. Petersburg, Florida terminal. Approximately a month later, on September 4, 1983, Complainant was provided with a city truck to drive to lunch while repairs were being made to the warning and marker lights on his trailer. A water hose broke while Complainant was driving the city truck. When he called to report the situation, Michael Titus, the terminal manager, stated over the phone "I'm sick of your (expletive); I'm going to personally see to it you get yours." (Tr. p. 703). When Complainant returned to the terminal, Mr. Titus stated, *inter alia*, "I'm going to personally see to it you get yours." (Tr. pp. 704-705).

21. Mechanic, Lee Pearson, advised Mr. Titus that the problem with the city truck was the result of a worn part. However, Mr. Titus continued to blame Complainant for the breakdown.

22. The day after the breakdown of the city truck, Mr. Titus was quoted as stating that somewhere or somehow he was going to discharge Complainant.

23. As a result of Mr. Titus's threat, Complainant wrote to the president of Roadway and the president of the union.

24. From February 1981 through November 1983, excluding the months of April 1981, September 1982 and May 1983, Complainant's daily logs reflect that he had 163 breakdowns. During ten months in 1983, Complainant had 35 breakdowns due to problems with various lights on his trucks.

25. Prior to a breakdown on November 22, 1983, there is nothing in the record to suggest that any of the problems with Complainant's tractors or trailers were not legitimate. Among his associates at Roadway, Complainant had the reputation of being honest.

26. The Road Boss II tractors commonly driven by Respondent's drivers were generally in well worn condition with breakdowns a common occurrence. The condition of those trucks provided Complainant with ample opportunity to detect violations of the DOT safety regulations.

27. Before a Roadway road driver departs on a trip, a mechanic or other terminal employee performs a pre-trip inspection to insure that the truck is in compliance with the DOT safety regulations. However, road drivers have found flat tires and other obvious problems on trucks that had been approved for dispatch.

28. On November 19, 1983, Complainant wrote to the FHA requesting information as to whether a driver, who had discovered a safety defect, could be required to drive a truck which a mechanic had certified to be in safe operating condition. Complainant gave a copy of the FHA's response, that if a driver operates a truck under

such circumstances it would violate DOT safety regulations, to Roadway's shop foreman in Lake Park and he posted another copy on the bulletin board in the relay terminal.

29. On November 21, 1983, Complainant was dispatched from Lake Park to the St. Petersburg terminal. At approximately 11:00 P.M., near Tampa, Florida, Complainant was advised through a CB conversation with another driver that the marker lights on his truck were not operating.

30. Complainant arrived at the St. Petersburg terminal shortly after midnight November 22, 1983. After the trailer which was to be returned to Lake Park was hooked to Complainant's tractor, terminal employee Bill Radovich performed a pre-trip inspection. He testified that he did not remember whether the tractor marker lights were on or off, but he did check to insure that they were working.

31. Complainant, after being advised that the truck was ready to go, conducted his own pre-trip inspection and discovered that the tractor marker lights and a marker light on the trailer were out. When Mr. Titus was advised of the situation, he became visably angry.

32. Complainant was driving a Road Boss II tractor on this occasion. The marker light connector plug on this type of tractor is located underneath the dash board near the front part of the passenger door. It is extremely difficult, if not impossible, to reach the widow crank on the passenger side from the driver's seat. It is, therefore unlikely that it would be possible to unplug the marker light connector from the driver's seat.

33. Vendor mechanic Pearson went to the St. Petersburg terminal to repair Complainant's truck. He corrected the problem by pluging the marker light connector. He noticed that the wires to the connector had dirt on them but that the connector itself was clean. Mr. Pearson

also repaired the marker light on the top right front of the trailer by pushing the light back into its holder. He concluded it had a loose connection which could have been caused by any kind of vibration.

34. After Mr. Titus was informed of the unpluged connector, he contacted Mr. Jerry Morgan. Mr. Morgan then called Mr. Jenkins and informed him of the earlier conversation with Mr. Titus.

35. Under the terms of the collective bargaining agreement, an employee of Roadway may be discharged without a warning notice for committing an act of dishonesty. On the basis of the information provided by Mr. Titus, Mr. Jenkins decided November 22, 1983 to discharge Complainant and directed Mr. C. Boatwright to issue the discharge notice.

36. Mr. Jenkins was aware that Complainant had filed complaints concerning safety violations involving Roadway with Senator Hawkins and Congressman Hatcher.

37. Complainant filed a complaint concerning the discharge with the U.S. Department of Labor on February 7, 1984.

38. During the years 1982 and 1983, Complainant earned $48,829.67 and $51,892.48, respectively, working for Respondent.

39. At all times relevant herein, Respondent contributed $45.50 per employee, per week, to the Central States, Southeast and Southwest Areas Health and Welfare Fund and $55.00 per employee, per week, to the Central States Southeast and Southwest Areas Pension Fund, respectively.

40. In 1984, after being discharged by Respondent, the Georgia Department of Labor awarded Complainant $4,250.00 in unemployment compensation.

41. Complainant started looking for a new job immediately after his discharge by Roadway. He contacted every trucking company in Valdosta, Georgia, and also

contacted prospective employers in Jacksonville, Florida, Savannah, Titusville and Whitman, Georgia.

42. Complainant worked for Boyd Brothers Transportation Company of Clayton, Alabama, September 11 through September 18, 1984. He earned $505.40 during this eight day period.

43. Complainant then worked as a truck driver for Glen McClendon Trucking Company from October 17, 1984 through December 14, 1984. He earned $3,024.59.

44. Complainant left the employment of Boyd Brothers and McClendon Trucking due to alleged safety violations and his need to attend to personal farming business.

45. In January 1985, Complainant earned $300.00 from Don's Trucking Company. He resigned that position after receiving notice that the Regional Administrator had ordered his reinstatement by Roadway. By the time Complainant had learned that Roadway intended to appeal the reinstatement order, Don's Trucking Company had hired a replacement driver.

46. On April 15, 1985, Complainant was hired as a driver by Taylor-Maid Transportation, Inc. of Albany, Georgia. This employment is continuing and, through July 29, 1985, Complainant has received gross wages in the amount of $5,581.64.

47. At the hearing Complainant waived his statutory right to recover for expenses he may have incurred in regard to this complaint and in seeking other employment.

CONCLUSIONS OF LAW

1. Complainant, at all relevant times, was employed as a driver of commercial motor vehicles and, therefore, was an employee within the meaning of Title 49, U.S.C. § 2301(2).

2. Respondent, Roadway Express, Inc., operates motor vehicles which are assigned to its employees to transport in commerce, and is an employer and a person, respectively, within the meaning of Title 49, U.S.C. § 2301(3) and (4).

3. Complainant timely filed a complaint with the Regional Administrator alleging a violation of Section 2305(a).

4. Section 2305(a) provides that "(n)o person shall discharge, discipline or in any manner discriminate against employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee . . . has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard or order, or has testified or is about to testify in any such proceeding."

5. Complainant took action ". . . relating to a violation of a commercial motor vehicle safety rule, regulation, standard or other order" within the meaning of Section 2305(a), in that the following safety related concerns expressed by Complainant are reflected in the DOT safety regulations:

> a) main springs on trailers—The obvious requirement that such be operational and not broken, to prevent a trailer from overturning or losing control, is set forth at Sec. 396.7(a) which provides that trucks shall not be operated in such a condition as to likely cause an accident.
>
> b) Brake (stop) lights on trailers—Sec. 393.14(b) requires the rear of trailers to have two stop lights, which are actuated upon application of the brakes [Sec. 393.25(g)] and are in working order [Sec. 393.91].

c) flat tires—Sec. 393.75(f)(4) provides that trucks may not be operated with less tire pressure than that specified for the load being carried.

d) marker lights—Sec. 393.14(a) and (c) require trailers to have marker lights. Tractors are required to have marker lights ["identification" and "clearance" lamps] pursuant to Sec. 393.13. All marker lights are required to work pursuant to Sec. 393.9 and must be steady burning as required by Sec. 393.26(f).

e) trailer tail lights—Such are required pursuant to Sec. 393.14(b), must be in working order as required by Sec. 393.9 and are required to be steady burning pursuant to Sec. 393.26(f).

f) maximum on duty time—For Roadway drivers, such may not exceed 70 hours in an eight day period pursuant to Sec. 395.3(b).

g) rules against speeding—Sec. 392.2 requires that trucks be operated in compliance with the laws of the jurisdiction wherein operated. Sec. 392.6 prohibits a motor carrier from scheduling runs requiring speeding for the timely completion thereof.

h) clutch—Such must be operational pursuant to Sec. 396.7(a), which requires that trucks shall not be operated in such a condition as to likely cause an accident.

i) loose wires—These are prohibited by Sec. 393.33, which requires that wires be systematically arranged and installed in a workmanlike manner.

j) headlights—Section 393.13(a) and 393.9, respectively, require tractors to be equipped with two headlights which are in working order.

k) accelerator spring—Such must be operational pursuant to Sec. 396.7(a), which requires that trucks shall not be operated in such a condition as to likely cause an accident.

l) decalomania or stickers—Pursuant to Sec. 393.60(c), such may extend upward no more than 4.5 inches from the bottom of a truck's windshield.

6. The reporting of breakdowns to Roadway supervisors, the letters of complaint directed to Roadway officials and the filing of complaints and opinion requests with the FHA are protected activities for which an employee cannot be discharged or discriminated against by his employer. These activities constitute the filing of a complaint within the meaning of Section 2305(a).

7. The totality of the evidence causes the conclusion that the protected activity engaged in by Complainant, of which Respondent had knowledge, was the motivating factor resulting in the discharge. The record is replete with many statements by Roadway supervisors demonstrating their animus toward the Complainant as a result in his engaging in protected activities. The issuance of warning letters to Complainant, while other employees were not reprimanded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive.

8. Respondent has failed to prove by a preponderence of the evidence that Complainant was discharged for legitimate reasons apart from any improper motivation. The alleged commission of "an act of dishonesty . . . creating a false breakdown" is a possible, but not probable interpretation of the conflicting evidence concerning the incident of November 22, 1983.

9. While it could be argued that Complainant would benefit from a lengthy breakdown, there is nothing to indicate that he benefitted from a brief breakdown at the relay terminal. Based on the entire record and particularly the appearance and demeanor of Complainant during the trial, a conclusion that Complainant created a false breakdown is not warranted. The primary evidence for such a conclusion would have to come from the testimony of Mr. Titus. Due to the personal animus he demonstrated

towards the Complainant, this testimony must be closely scrutinized and is, therefore, insufficient to establish the existence of a false breakdown or even a good faith belief that it might have occurred.

10. While the actual order to discharge Complainant was authorized by Mr. Jenkins, he acted on the basis of information received from Mr. Titus. The conclusion that Mr. Titus intended to unlawfully discriminate against Complainant vitiates the discharge order. Further, the record supports the conclusion that Mr. Jenkins was annoyed by Complainant's engaging in protected activity.

11. The motive of Respondent at the time of the discharge controls whether a discriminatory purpose was involved. Any information obtained during Roadway's post-discharge investigation conducted December 13 and 14, 1983 does not mitigate the unlawful motive demonstrated November 22, 1983.

ORDER

It is, therefore, ORDERED, ADJUDGED AND DECREED that Respondent, Roadway Express, Inc., shall:

1. Reinstate Complainant to his former position with back pay and restore the seniority and other benefits, including but not limited to health and welfare and pension contributions to which he would have been entitled had he not been discharged.

2. The amount of back pay due Complainant is determined by subtracting actual earnings in mitigation from the wages he could have earned with Roadway but for the discharge.

3. Complainant's back pay is to be calculated at the rate of $1,115.97 per week.

It is further ORDERED:

1. Respondent is not liable for pre-judgment interest, and

2. The back pay award is to be reduced by the $4,250.00 in unemployment compensation paid by the State of Georgia.[2]

Entered this 30th day of October, 1985, at New Orleans, Louisiana.

/s/ JAMES W. KERR, JR.
Administrative Law Judge

[2] Respondent has not demonstrated that Complainant failed to make reasonable efforts to obtain interim employment. Respondent introduced no evidence that there were jobs available which Complainant could have discovered and for which he was qualified. However, the evidence causes the conclusion that Complainant's personal farming business was a critical factor in his relationship with Boyd Brothers and McClendon Trucking. His resignation from Don's Trucking Company prior to being reinstated by Roadway did not constitute good judgment. Since it would be speculative as to whether Complainant would have worked out his differences with Boyd Brothers or McClendon Trucking absent the requirements of his personal farming business, the Court is of the opinion that denying interest on the amount due and permitting credit for the unemployment compensation is the appropriate remedy.

APPENDIX G

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

File No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION,
PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

AFFIDAVIT OF LEON P. SMITH

COUNTY OF FULTON
STATE OF GEORGIA

1. My name is Leon P. Smith. I am employed by the United States Department of Labor, Occupational Safety and Health Administration, as the Regional Supervisory Investigator of the 11(c) Section in Atlanta, Georgia.

2. In my capacity as Supervisory Investigator, I have knowledge of the Department of Labor's procedures for the conducting of investigations under § 405 of the Surface Transportation Assistance Act of 1982 [49 U.S.C. § 2305] [hereinafter the "Act"]. I also have knowledge of the Department's investigation conducted under the Act into the complaint of Jerry W. Hufstetler, which complaint was filed on February 7, 1984. The field investigator who investigated Mr. Hufstetler's complaint was Don Cameron of my staff.

3. In the investigation of cases under the Act, the Secretary of Labor, through the Occupational Safety and Health Administration, utilizes experienced investigators who conduct a substantial investigation to determine whether a complaint has merit. Under existing investigatory procedures, the persons alleged to be primarily responsible for the discriminatory action are afforded the opportunity to fully state and support their positions. Additionally, the assigned field investigator is required to verify the complainant's allegations through credible, independent evidence. The investigator's report is then reviewed by the regional supervisory investigator, and, where a complaint is found to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys within the Office of the Solicitor.

4. The investigatory and review procedures outlined in paragraph 3, hereinabove, were utilized in full in the investigation of Hutstetler's complaint under the Act, and led to a finding on behalf of the Secretary of Labor of reasonable cause to believe that Hufstetler's complaint had merit.

I have freely given this Affidavit, and, to the best of my knowledge and belief, it is true, accurate and correct.

/s/ Leon P. Smith
LEON P. SMITH

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C85-997A

ROADWAY EXPRESS, INC., A DELAWARE CORPORATION, PLAINTIFF,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, REGION FOUR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to the provisions of L.R. 220-5(b)(1), N.D. Ga. and in support of its motion for summary judgment filed herewith, defendant Roadway Express Inc. ("Roadway") submits its statement of material facts as to which there is no genuine issue to be tried:

1.

Roadway is a common motor carrier engaged in interstate trucking as a part of its business in Lake Park, Georgia; as a part of its business, Roadway employees operate commercial motor vehicles in interstate commerce principally to transport cargo; Roadway therefore is subject to the provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"), and to defendants' efforts to enforce the provisions thereof. (Complaint, ¶ 15, Ex, C; Answer, ¶ 15).

2.

On November 22, 1983, former Roadway employee Jerry W. Hufstetler was discharged bv Roadway Express inc. for an alleged act of dishonesty. (Complaint, ¶s 5,7; Defendant's Answer, ¶s 5,7).

3.

On November 27, 1983, Hufstetler filed a grievance under the provisions of the National Master Freight Agreement, a collective bargaining agreement governing the working conditions of Roadway employees at the company's Lake Park Georgia facilities who are represented by Teamsters Local Union No. 528 ("Local 528"). (Complaint, ¶ 7; Answer, ¶ 7).

4.

Discharge cases filed as grievances under the NMFA ordinarily are resolved at a first level arbitration panel hearing or within three months thereafter if a deadlock occurs at the first level (Multistate) and the case proceeds to a second level arbitration panel (Area). (Second Webb Aff., ¶¶ 4-5).

5.

Under the NMFA, Multistate and Area arbitration panels have the right to reinstate discharged employees with full, partial or no compensation for time lost; when such panels find in favor of a discharged employees, the employee is ordered reinstated. (Second Webb Aff., ¶ 5).

6.

When Roadway drivers are reinstated by order of a NMFA committee or otherwise, and an extra driver is not needed at the driver's home terminal, a driver at that ter-

minal is laid off in accordance with the terms of the NMFA. (Second Webb., ¶ 6).

7.

On December 19, 1983, Hufstetler's grievance was heard before the Southern Multi-State Grievance Committee ("Multi-State Committee"), an arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer, ¶ 9).

8.

The Multi-State Committee deadlocked and the case was referred to the Southern Conference Area Grievance Committee ("Area Committee"), a second level arbitration panel established pursuant to the terms of the NMFA. (Complaint, ¶ 9; Answer ¶ 9).

9.

On January 30, 1984, the Area Committee denied Hufstetler's grievance and sustained his discharge for an act of dishonesty in creating a false breakdown at Roadway's St. Petersburg, Florida terminal. (Complaint, ¶ 9; Answer, ¶ 9).

10.

On February 7, 1984, Hufstetler filed a telephonic complaint with the Atlanta office of the United States Department of Labor ("DOL") in which he complained that he had been discharged because "the St. Petersburg's terminal manager was upset [when he] requested costly repairs needed for truck driving safety." (Complaint, ¶ 10; Answer, ¶ 10).

11.

Upon the receipt of this complaint by telephone, the DOL began an investigation to determine whether Hufstetler had been terminated from employment by Roadway in violation of Section 405 of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 2305. (Complaint, ¶ 10; Answer, ¶ 10).

12.

DOL investigated Hufstetler's complaint through an investigating officer; pursuant to DOL's request during the investigation, Roadway submitted a written position statement with supporting affidavits explaining the circumstances of Hufstetler's discharge and the NMFA arbitration decision upholding the discharge. (Complaint, ¶ 11; Answer, ¶ 11).

13.

On September 7, 1984 Roadway's counsel wrote a letter to DOL stating Roadway's position that any preliminary order reinstating Hufstetler prior to the conduct of an evidentiary hearing would constitute a denial of due process of law under the Fifth Amendment to the United States Constitution. Complaint, ¶ 12; Answer, ¶ 12).

14.

During DOL's investigation of Hufstetler's complaint, DOL denied Roadway access to written statements of witnesses provided to DOL during its investigation of Hufstetler's complaint on the grounds that such statements were "confidential," and denied Roadway knowledge of names of the individuals from whom statements were taken by the DOL investigator. (Complaint, ¶ 14; Answer, ¶ 14).

15.

Defendants' procedures for determining whether to issue temporary reinstatement orders pursuant to 49 U.S.C. § 2305(c)(2)(A) include a field investigation by an assigned DOL employee, a review of the investigator's report by a regional supervisory investigator, and, where the investigator finds the complaint to have merit, by the Occupational Safety and Health Administration's Regional Administrator and by attorneys with DOL's office of the Solicitor; such procedures do not include an evidentiary hearing on the merits of the complaint prior to issuance of such a temporary reinstatement orders. (Affidavit of Leon P. Smith, ¶ 3).

16.

To date, DOL has established no regulations or other procedures whereby on evidentiary hearing is to be conducted prior to DOL's issuance of pre-hearing preliminary orders of reinstatement pursuant to 49 U.S.C. § 2305 (c)(2)(A). (Smith Aff., ¶ 3).

17.

On or about January 21, 1985, DOL rendered its Secretary's findings and preliminary order ordering Roadway to "immediately" reinstate Hufstetler to his former position as a road driver prior to any hearing on Hufstetler's STAA complaint; the January 21, 1985 order also required payment of back pay calculated from the date of Hufstetler's discharge. (Complaint, ¶ 15,19; Answer, ¶s 15, 19; Smith Aff., ¶ 4).

18.

On or about January 31, 1985, Roadway timely filed its objections to the January 21, 1985 Secretary's findings and preliminary order pursuant to 49 U.S.C. § 2305(c)(2)(A). (Complaint, ¶ 16; Answer, ¶ 16).

19.

A substantial controversy exists between Roadway and defendants with respect to whether 49 U.S.C. § 2305(c)(2)(A), insofar as it purports to empower and require defendants to issue preliminary order of reinstatement prior to the conduct of an evidentiary hearings, is unconstitutional and void as violative of the minimum requirements of procedural due process under the Fifth Amendment: Roadway contends that the due process clause of the Fifth Amendment requires that an evidentiary hearing be conducted prior to the issuance of any order of reinstatement; defendants contend that the Secretary of Labor is constitutionally empowered and required under 49 U.S.C. § 2305(c)(2)(A) to issue and enforce such preliminary orders of reinstatement without such a hearing. (Complaint, ¶ 22; Answer, ¶ 22).

Respectfully submitted,
FISHER & PHILLIPS

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